Denice Harris
[illegible]
Washington, D.C. [illegible]
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PACIFIC TELESIS
Group-Washington

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February 24, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *CC Docket No. 96-254 - Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its *"Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Denice Harris

Denice Harris
Internet: dharris@legal.pactel.com

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	CC Docket No. 96-254

COMMENTS OF PACIFIC TELESIS GROUP

MARLIN D. ARD
SARAH R. THOMAS

140 New Montgomery Street
Room 1522A
San Francisco, California 94105
(415) 542-7649

MARGARET E. GARBER

1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-6472

Its Attorneys

Date: February 24, 1997

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In the Matter of Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	CC Docket No. 96-254

COMMENTS OF PACIFIC TELESIS GROUP

I. SUMMARY

Pacific Telesis Group has four key concerns about this rulemaking.[1] The first relates to the definition of "manufacturing": the term should not be defined so broadly as to encompass design or development projects, or a BOC's experimental or research activities that it does not conduct formally or on a large scale.

Our second concern relates to the Commission's proposed rules for entities that are not "accredited standards development organizations" under Section 273(d)(4). The Commission proposes a definition so broad as to encompass informal, day-to-day activity that Congress could not have intended to subject to the "notice and comment" rules of the statute. Such activity, including BOC participation in meetings with other BOCs to establish specifications, produces positive results such as interoperability and lower consumer prices. The Commission should define the term "standards" to include only mandatory, binding requirements and not voluntary, non-binding guidelines, and only find

[1] *Implementation of Section 273 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, CC Docket No. 96-254, FCC 96-472, *Notice of Proposed Rulemaking* (rel. Dec. 11, 1996) ("*NPRM*").

that an entity is engaged in "certification" activities when such activities relate to binding requirements. In addition, the Commission should not expand on Section 273(d)(4)(C)'s rules against "monopolization": such conduct should be defined by existing antitrust precedent.

Third, Section 273 should not subject us or other BOCs to "non-discrimination" requirements when we procure equipment from outside entities that do not meet the definition of "affiliate." The requirement in Section 273(e) that we not discriminate in favor of equipment produced or supplied by a "related person" should not impose non-discrimination requirements on BOC dealings with non-affiliates.

Fourth, we do not believe Congress intended any provision of Section 273 to apply to a BOC *not engaged in manufacturing.* And in the unfortunate event the Commission construes Sections 273(c)'s disclosure requirements to apply to non-manufacturing BOCs, it should conform those requirements to other, similar requirements it is implementing in connection with Section 251 of the Telecommunications Act of 1996 (the "Act"). Otherwise, BOCs will be burdened unnecessarily with duplicative, inconsistent and cumbersome disclosure requirements.

II. DESIGN, DEVELOPMENT AND INCIDENTAL, EXPERIMENTAL OR CASUAL ACTIVITY SHOULD NOT BE DEEMED "MANUFACTURING"

A. The Term "Manufacturing" Should Not Include "Design or Development"

The Commission should define "manufacturing" narrowly. Nothing in Section 273 requires that the definition include *design* or *development* activities, for example, despite the Commission's tentative conclusion to the contrary. ¶ 10 (stating that "manufacturing" should include the "'design, development and fabrication' of telecommunications equipment, CPE, and the 'software integral to [this] equipment hardware, also known as firmware.'").

While we agree that in the context of the MFJ the term included design and development activities as well as fabrication,[2] Section 273 dictates a different conclusion here. Section 273(b) states that Section 273's manufacturing prohibition "shall not prohibit a Bell operating company from (A) engaging in *research activities* related to manufacturing." 47 U.S.C. § 273(b)(2)(A) (emphasis added); *see also* § 273(b)(1) (manufacturing restriction "shall not prohibit a [BOC] from engaging in close collaboration with any manufacturer of [CPE] or telecommunications equipment *during the design and development* of . . . such equipment.") (emphasis added). Thus, despite the MFJ's definition, and Section 273(h)'s definition of "manufacture" coextensively with the MFJ, Sections 273(b)(1) and (2) must "trump" the MFJ definition because they explicitly exclude design, development and research from Section 273's scope.

B. "Manufacturing" Should Not Include Incidental, Experimental or Casual Activity

In addition, the term "manufacturing" should not be defined to include every act of fabrication in which a BOC might engage. The term should exclude casual, experimental or incidental

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[2] *See U.S. v. Western Electric Co.*, 675 F. Supp. 655, 662 (D.D.C. 1987), *aff'd*, 894 F.2d 1387 (D.C. Cir. 1990).

activity. For example, if our field personnel occasionally develop, on an *ad hoc* basis, devices used to aid in installation or diagnose problems in the field, such activities should not be prohibited. Indeed, such test equipment -- *i.e.*, equipment used in the field which is not interconnected to the network -- *is not telecommunications equipment or CPE* at all. *See* 47 U.S.C. § 273(a) (statute applies only when BOC "manufactures" telecommunications equipment and CPE). Judge Greene explicitly excluded test equipment from the MFJ's manufacturing ban. *United States v. Western Elec. Co.*, Civ. No. 82-0192, slip op. at 7-8 (D.D.C. Feb. 16, 1989) (Attachment A hereto).[3]

Nor should experimental devices developed in our research laboratories qualify as "manufactured" equipment falling within Section 273(a). For example, we have research laboratories focused on our ISDN, Internet and video services. While these laboratories are engaged in experimentation on devices that might enhance these services, they should not be bound by Section 273. Only if the BOCs put a device into production should the requirements begin to apply.

Thus, "manufacturing" should only include production-scale fabrication -- production conducted formally or on a large scale. It is only formal or large-scale manufacturing that presents the competitive risks with which the Commission is concerned. *See* ¶¶ 1-3.

III. THE COMMISSION'S RULES REGARDING STANDARDS-SETTING THREATEN TO SQUELCH LEGITIMATE ACTIVITY DESIGNED TO CREATE BENEFITS SUCH AS INTEROPERABILITY AND LOWER CONSUMER PRICES

The Commission interprets Section 273(d)'s provisions regarding "standards-setting" far too broadly. It is important that BOCs, as purchasers of telecommunications equipment, be allowed

[3] *Cf., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Second Report and Order,* FCC 96-333, ¶ 260 (rel. Aug. 8, 1996) ("[M]arket and technical trials are not subject to disclosure under Section 251(c)(5). Trials are not considered regular service . . . .").

to decide what their specifications will be for the equipment they need. BOCs must also be allowed to make these decisions in discussions with other BOCs so that their telephone equipment will be compatible. Such discussions produce positive results for the market: if telephones cannot "talk" to one another, no one will buy them. Because telephone systems are compatible with one another, telephony is a hugely successful business.

In addition, if groups of purchasers get together, determine their equipment specifications and form buying clubs, they can obtain lower wholesale prices, which they can pass through to consumers in the form of lower retail prices. They can also provide stronger encouragement to manufacturers to invest in innovative new equipment than could one purchaser standing alone.

Unfortunately, many of the Commission's proposals threaten to squelch the foregoing positive activity. For example, the Commission proposes an overbroad definition of standards-setting activity engaged in by an "entity that is not an accredited standards development organization." 47 U.S.C. § 273(d)(4), *see* ¶ 50. Because Section 273(d)(4) imposes significant new public notice and comment burdens on BOCs, only a narrow range of activities should require a BOC to face these burdens. Indeed, given that Section 273(d)(4) restricts its coverage to an "entity," the statute should not apply to informal groups at all, but only to legal "entities." And the language in Section 273(d)(4)(A) makes clear that if specifications are not "establish[ed] and publish[ed]," they are also not covered by the statute.

BOCs must have rights as equipment purchasers to set specifications for that equipment, even if they meet with other BOCs in doing so, without having to open their meetings to members of the public. If a BOC develops its own product requirements, even if it does so in conjunction with other BOCs who have their own requirements, it is not engaged in "standards-setting" activity under Section 273(d)(4). The Commission will hurt the cause of interoperability and compatibility if it

requires that BOCs set their requirements in a vacuum without consulting other BOCs, or open every meeting at which they attempt to arrive at specifications.

The Commission can assure that BOCs continue to have the right to engage in this positive activity if it defines Section 273's terms properly.

A. The Commission Should Define Certain Terms Carefully

1. "Standards"

The Commission should carefully define the term "standards." *See* ¶¶ 34, 41. The term should *exclude voluntary, non-binding* specifications, whether developed by an entity that certifies telecommunications equipment or CPE -- a Section 273(d)(3) entity -- an entity that is not an accredited standards-development organization -- a Section 273(d)(4) entity -- or anyone else. "Standards" should only be at issue -- and the provisions of Section 273(d) applicable -- where an entity develops *mandatory, binding* specifications by which manufacturers of equipment must abide.

Furthermore, specifications a BOC develops for *safety* reasons -- *e.g.*, bracing requirements in central offices to protect occupants and equipment in the event of an earthquake -- or *data privacy and integrity* reasons -- such as specifications for electronic data transfers -- should not be construed as "standards" on which BOCs must seek public comment. In defining the term "standards," the Commission should focus on specifications to which a manufacturer must adhere in *fabricating* its equipment -- not additional contractual requirements imposed for safety or other reasons.

In this regard, we do *not* agree that it would constitute "circumvention" of Section 273(d)(4)'s provisions for a BOC to designate standards or generic requirements as "internal," "non industry-wide," "optional" or "company specific." ¶ 50. The reach of Section 273(d)(4) is potentially very wide, and its burdens are significant -- comparable to a "notice and comment" process. Companies must be allowed to discuss and develop their own internal equipment specifications, or

voluntary or optional guidelines applicable to the industry as whole, without coming under the provisions of Section 273(d)(4). As long as a company *reasonably and in good faith* labels guidelines it develops as, for example, "internal," "non industry-wide," "optional" or "company-specific," it should not be required to comply with the "notice and comment" obligations of Section 273(d)(4).

Moreover, we should not be bound by any of Section 273's requirements if we simply require that a vendor adhere to standards *already developed by someone else*. For example, the fact that a vendor has obtained ISO 9000 certification or met the Baldridge Award quality standards should be something we can treat favorably in awarding a contract to that vendor. When we do this, we are not ourselves setting standards, but merely relying on the standards-setting activities of other entities in deciding with whom to contract. Section 273(d)(4) should not apply to such activity.

2. "Certification"

In addition, the term "certification" under Section 273(d)(4)(B) -- relating to entities that are not accredited standards development organizations and that establish industry-wide standards for equipment, and that also engage in product "certification" -- needs clarification. The statute defines "certification" as "any technical process whereby a party determines whether a product, for use by more than one local exchange carrier, conforms with the specified requirements pertaining to such product." 47 U.S.C. § 273(d)(8)(D).

Thus, "certification" only applies to a "technical process," products "for use by more than one local exchange carrier," and, most importantly, determinations of whether a product conforms with the "specified *requirements* pertaining to such product." *Id.* (emphasis added). Processes that are not "technical" and do not pertain to "requirements" for a product -- i.e., mandatory, binding standards as opposed to voluntary, non-binding guidelines -- should not qualify as "certification."

Moreover, ordinary testing of new equipment should not constitute "certification." Every time we install equipment in our switches we have to test and "debug" the equipment. Occasionally, one carrier will receive a piece of software before we do, and test the software before other BOCs load it. This process -- called "first application testing" -- should not be deemed "certification." Finally, we occasionally give "quality awards" to vendors for work well done. These awards are intended to be motivational, and give recognition, in the context of our relationship with our vendor, not as a warranty or "certification" of the vendor's product to outsiders.

3. "Monopolize"

Finally, the requirements of Section 273(d)(4)(C) -- restricting "monopolization" activities by entities that are not accredited standards setting development organizations and that establish industry-wide standards for equipment -- should be interpreted to do no more than require such companies to comply with the antitrust laws. *See* ¶ 56. The Commission should not, therefore, "identify specific acts that would constitute *per se* violations of Section 273(d)(4)(C)." *Id.* Indeed, in the antitrust context, there are no *per se* rules prohibiting "monopolization" by a single firm engaged in unilateral conduct.

The only *per se* violations under general antitrust principles are horizontal agreements to fix prices; vertical agreements to fix prices; horizontal market allocations, and certain group boycotts. *See, e.g.* , *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993) (horizontal price fixing); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) (vertical price fixing); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. General Motors Corp.*, 384 U.S. 127, 145-146 (group boycotts). Imposition of a new set of "*per se*" violations under Section 273 that could be construed to apply to "monopolization" or any other form of unilateral conduct would be

unprecedented and illogical. The Commission's assumption that *per se* rules are appropriate in this context thus has no basis in antitrust precedent.

Likewise, the Commission should not set "specific penalties (for example, fines and forfeitures) [to] be assessed for specific violations. . . ." *Id.* The term "monopolize" is one about which a great deal of antitrust case law has developed. It is to this precedent -- and only to this precedent -- that the Commission should turn in construing the "monopolization" provisions of Section 273 when faced with an actual complaint.

IV. SECTION 273(e)'S NON-DISCRIMINATION REQUIREMENTS SHOULD APPLY ONLY TO BOCs AND THEIR AFFILIATES AND EMPLOYEES

One of the Commission's most extreme proposals relates to the interpretation of the non-discrimination provision of Section 273(e), which provides that a BOC[4] "may not discriminate in favor of equipment produced or supplied by an affiliate *or related person.*" (Emphasis added.) Contrary to the Commission's suggestion, the term "related person" should not extend a BOC's Section 273 non-discrimination obligations to parties with whom BOC has a contract, "with whom [it has] *some type of relationship*," or with whom it has a royalty agreement. ¶ 67 (emphasis added). If carried to its logical extreme, the Commission's suggestion that "related person" extends beyond affiliates would require that a BOC not favor *any* party with whom it already has a contract.

The pro-competitive nature of Section 273 (*see* ¶ 1) would be subverted if a BOC could not contract with a vendor with which it already has a productive relationship for fear of being accused of Section 273 "discrimination." There are legitimate business reasons for continuing to use a

[4] We construe Section 273(e) (as well as Section 273(c)) to apply only to BOCs engaged in manufacturing. *See* discussion in Section V below. Nothing in this discussion should be construed to suggest otherwise.

particular contractor, and BOCs should not be prohibited from doing so if their decision is based on the merits of the vendor and its products or services.

We propose, therefore, that the term "related person" be defined only to include our affiliates or employees. This interpretation is consistent with Section 273(e). That section imposes obligations not only on BOCs,[5] but on "any entity acting on [the BOC's] behalf." Because the term "affiliate" is often used in connection with the term "BOC" or "LEC," it makes sense that that term would also be used here. On the other hand, the term "affiliate" is not a term of art in connection with "entit[ies] acting on [a BOC's] behalf." It is logical for this reason, we believe, that Congress included the term "related person" to denote parties affiliated with entities acting on a BOC's behalf. Congress could not have intended to give "related person" the broad interpretation the Commission proposes; such an interpretation will only hamstring our procurement efforts, disadvantage third party manufacturers just because we have already deemed them qualified to receive our business, and ultimately hurt competition.

There is also the question of the definition of "discrimination" in Section 273(e). The term should *not* require us to choose products that are less meritorious than our own or those of our affiliates. Thus, *merit*-based distinctions should not be prohibited; we agree with the Commission's tentative conclusion to this effect. ¶ 66 ("a BOC may need to take affirmative steps to ensure that it does not favor proposals from 'affiliates or related persons' *for reasons other than merit.*") (emphasis added).

We also agree with the Commission's proposed definition of Section 273(e)'s requirement that we "consider . . . equipment, produced or supplied by unrelated persons . . . ." ¶ 65.

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[5] Again, we believe Section 273(e) also should apply only to manufacturing BOCs.

We should be deemed to have "consider[ed]" a vendor if we "think about [the vendor] seriously" or bear [the vendor] in mind." *Id.* Section 273 should not require, however, that we accept bids from other vendors, or put contracts out on competitive bid. To the extent the Commission's proposal that a BOC should "open[] its procurement and sales processes to entities other than itself or its affiliate(s)" suggests a bidding requirement, therefore, we would object to this interpretation of Section 273. *Id.* However, if the Commission is merely suggesting that we must not erect unreasonable barriers to third party manufacturers, we agree with this interpretation.

Section 273(e)'s non-discrimination standards should not apply to all equipment -- only to "equipment, services and software" directly related to "telecommunications equipment and CPE." "Services" and "software" should only be those essential to the procurement of telecommunications equipment and CPE, not to a broader group of services or equipment. *See* ¶ 68, citing *U.S. v. Western Electric Co.,* 675 F. Supp. at 667 n.54.

Finally, Section 273(e)(3)'s allowance of "joint network planning and design with local exchange carriers operating in the same area of interest" "to the extent consistent with the antitrust laws," permits BOCs to engage in a broad range of activities without implicating Section 273 at all. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 501 (1988) (the great majority of standards-setting activities are procompetitive and provide substantial benefits to consumers).

V. NONE OF SECTION 273 SHOULD APPLY TO BOCs NOT ENGAGED IN MANUFACTURING, AND THE COMMISSION SHOULD NOT PROMULGATE DUPLICATIVE RULES

A. Section 273 Only Applies to BOCs Engaged in Manufacturing

We do not believe any of Section 273 applies to BOCs not engaged in manufacturing. *See* ¶¶ 17 (asking whether Section 273(c) applies to non-manufacturing BOCs), & 63 (Section 273(e)). The title of the statute is "Manufacturing by Bell Operating Companies." To the extent certain

provisions of the statute appear relevant to BOCs not engaged in manufacturing -- *e.g.*, Section 273(c), relating to network disclosure -- there are other provisions of the Act that afford third parties adequate protection. ¶ 17.

B. The Commission Need Not Promulgate Special Rules Under Section 273(c)

The Commission acknowledges that much of what is covered in Section 273(c) already has been decided in the FCC's Section 251 rulemaking. *See* ¶¶ 19 *et seq.* Even if the Commission believes any of the provisions of Section 273 apply to non-manufacturing BOCs, there is certainly no need to develop network disclosure standards pursuant to Section 273(c) that duplicate those of Section 251(c)(5). ¶ 20. Indeed, we believe the Commission should deem its Section 251 rules to be the rules applicable to Section 273 so as to avoid confusing, burdensome, inconsistent or duplicative obligations. The older rules developed under the FCC's *Computer III* rulemaking are subsumed within the Section 251 requirements the FCC created in CC Docket No. 96-98. *See* ¶ 15.

Having one set of rules relevant to network disclosure makes practical sense. The Commission erroneously observes that "our current rules regarding network information . . . address the needs of other carriers, information service providers ("ISPs"), enhanced service providers ("ESPs") and other members of the public for information about network capabilities, *and not the specific needs of manufacturers* who wish to develop new network products. . . ." ¶ 18 (emphasis added). In fact, the Commission already has network disclosure rules pertaining to manufacturers. *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*[6] ("The primary goals of this [network disclosure] safeguard are,

[6] CC Docket No. 86-79, *Memorandum Opinion and Order on Reconsideration,* 3 FCC Rcd 22 (1987), ¶ 12.

(1) to prevent the BOCs from designing new network services or changing network technical specifications to favor their own CPE or that of a preferred *manufacturer* . . . ").

More to the point, there is no need to have a set of rules that protects one set of parties and another set of rules to protect another set. Disclosure is disclosure. If a BOC discloses network information to "other carriers, ISPs, ESPs and other members of the public," it has effectively disclosed this information to the world. Thus, the Commission need not develop a whole new set of disclosure rules pertaining solely to manufacturers to ensure that they receive needed information.

Some of the Commission's proposals regarding disclosure of "planned changes" under Section 273(c) are also troublesome. For example, if a BOC is required to disclose information about "planned changes" to the Commission, § 273(c)(1), ¶ 18, this must be done under strict non-disclosure rules. *But see* ¶ 22 (proposing disclosure about "planned changes" to manufacturers). As the Commission acknowledges, "the announcement of the impending availability of a product prior to its actual availability . . . may have anticompetitive effects." ¶ 19. In order to avoid the "vaporware" syndrome, where premature announcements may stifle demand for competitive products, any rules requiring disclosure of "planned changes" must require notice only to the Commission, with suitable protection against public disclosure.

Only when the plans ripen into an actual decision to make or buy network equipment, or to otherwise change the network in a way that affects connection with or use of the network, should the changes be made public. This is consistent with the Commission's Section 251(c)(5) rules. ¶ 22. We thus believe that "compliance with the network disclosure obligations of Section 251(c)(5), as implemented by the Commission, would satisfy the information disclosure requirements of Section 273(c)(1) . . . ." ¶¶ 25, 30.

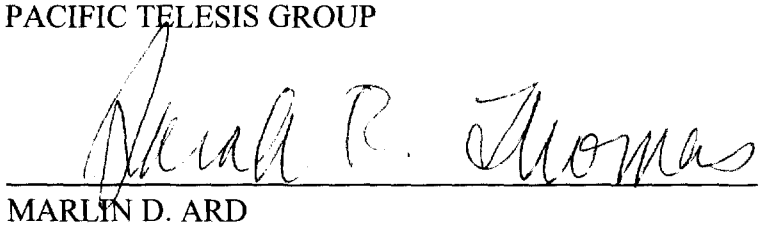
VI. CONCLUSION

We have no immediate plans to begin manufacturing telecommunications equipment or CPE. We are thus understandably concerned that the Commission will establish a series of new rules applicable to us even though we will engage in none of the activity Section 273 was enacted to cover. It would be ironic if in this deregulatory environment, the Commission promulgated a new set of rules applicable to non-manufacturing BOCs. Section 273 was designed to allow BOCs into the manufacturing business, and to condition their entry into the business with a series of rules designed to safeguard against anti-competitive conduct. It was not designed to *increase* the regulatory burden on BOCs that do nothing to change their business focus. The Commission should pause and think seriously about what Congress intended with Section 273 before adopting a series of heavy-handed

rules that 1) stifle innovation, 2) discourage ordinary, day-to-day network planning, and 3) dictate the vendor selection activities of BOCs simply attempting to secure the best value for their customers.

Respectfully submitted,

PACIFIC TELESIS GROUP



MARLIN D. ARD
SARAH R. THOMAS

140 New Montgomery Street
Room 1522A
San Francisco, California 94105
(415) 542-7649

MARGARET E. GARBER

1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-6472

Its Attorneys

Date: February 24, 1997
0157042.01

ATTACHMENT - A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., et al.,

Defendants.

Civil Action No. 82-0192 (HHG)

MEMORANDUM

Southwestern Bell has requested the Court to issue a declaratory judgment that the decree in this case permits the Regional Companies to repair and refurbish telecommunications and customer premises equipment as well as to design, develop, and sell electronic test equipment.

On December 3, 1986, the Department of Justice requested the Court to issue a waiver to permit Southwestern Bell to engage in the activities described above. The occasion for the request was a contract between Southwestern Bell and CTDI, a small Pennsylvania company, for the acquisition by the former of a controlling interest in the latter. Several interested parties filed responses or oppositions, but before briefing could be completed, Southwestern Bell requested the

Court on December 23, 1986 to render a decision within eight days, citing expected changes in the tax laws. On December 29, 1986, the Court expressed its reluctance to render decisions without appropriate opportunity for legitimate comment by interested parties, particularly where the reason provided for this shortcut detrimental to others was a desire to achieve tax advantages.

Nevertheless, in order to accommodate the request to the extent possible, the Court stated in a brief Memorandum in advance of Southwestern Bell's December 31 deadline, that (1) refurbished equipment might be regarded as new equipment and on that basis "it probably is competitive in the new equipment markets;" (2) the sale of such equipment by a Regional Company would raise problems concerning the incentive and the opportunity to discriminate against competitors; and (3) in any event, before it could render a reasoned decision favorable to Southwestern Bell, it would have to be made aware of certain relevant market shares. On this basis, the Court denied the waiver motion. In January of 1987, Southwestern Bell filed but then withdrew a motion for reconsideration.

After a hiatus of approximately one year, Southwestern Bell brought some of the issues again before the Court. On January 13, 1988, it filed a notice advising the Court that

it had eliminated from its proposed acquisition of CTDI all those features that, in Southwestern Bell's view, were prohibited by the decree. However, several interested parties, in particular United States Telecommunications Suppliers Association (USTSA) and Tandy Corporation promptly filed oppositions to the proposal, claiming that Southwestern Bell's assessment was in error.[1] In order to accommodate this new request for a decision, the Court, on March 31, 1988, once again established a briefing schedule.[2] However, the agreement between Southwestern Bell and CTDI apparently expired on that same date; it has not been renewed; and the question is whether there is a sufficiently concrete controversy pending before the Court to permit it to render a decision on the Southwestern Bell request.

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[1] Southwestern Bell informed the Court on January 29 and March 14, 1988, that it did not propose to proceed with the acquisition until the issues raised by its opponents had been resolved.

[2] Such briefing is required. United States v. Western Electric Co., 592 F. Supp. 846, 873-74 (D.D.C. 1984), appeal dismissed, 777 F.2d 23 (D.C. Cir. 1985). Southwestern Bell appears to suggest that, in view of the 1986 events, briefing was unnecessary. However, the earlier proceedings, which had been aborted either by actions or Southwestern Bell or the expiration of its agreement with CDTI, raised different issues than the new request. In fairness to all the parties, those interested in briefing the issues raised by the proposed acquisition were entitled to have an opportunity to comment upon it as it was then structured.

A number of the parties argue that the issues are moot, and that the Court either lacks power or that it should, on a prudential basis, refrain from rendering a decision. There is considerable force to the lack of jurisdiction argument, for courts are of course precluded under Article III of the Constitution from rendering decisions on hypothetical or abstract questions.[3] On the other hand, it may be that under some circumstances the decree, by its own force, permits the Court to exercise its continuing responsibility pursuant to section VII to render "such further orders or directions as may be necessary or appropriate for [its] construction," notwithstanding normal mootness rules.[4]

Whatever the correct answer to that issue in the abstract, the Court has had to conclude upon serious consideration that, even if no jurisdictional impediment exists, it could not issue the declaratory judgment that Southwestern Bell and others seek, absent a more definite

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[3] See generally, Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3533 (2d ed. 1984).

[4] While it was pending, the underlying litigation -- United States v. AT&T -- was of course very much alive in an Article III, judicial controversy, sense, and it would seem that the decree rendered therein may be implemented in accordance with its own terms without regard to ordinary mootness principles. It is on this basis that the Department of Justice, normally a strong proponent of the mootness doctrine, argues that the Court has jurisdiction to decide the current controversy.

fact situation than is present here. Such a judgment, based only on factual generalities, would be more of a disservice to the parties than an assist. As Tandy Corporation correctly points out,

> . . . each Regional Holding Company . . . transaction involves different facts which may raise different legal issues. Since the proposed acquisition has already been 'restructured' once, it is possible that any renewed proposal by [Southwestern Bell] to acquire CTDI would be further 'restructured.' It is also conceivable that [Southwestern Bell] or another [Regional Company] may seek to acquire a company other than CTDI which could be involved in lines of business similar -- but not identical -- to those in which CTDI is involved. For this reason, a decision by this Court in the abstract that the previously proposed -- but not detailed -- activities may be permitted under the decree, may send the wrong signal to the [Regional Companies].[5]

That these are not frivolous concerns is demonstrated by the Department of Justice's own submissions. While contending that the issues are not moot, and that overarching decree purposes should be regarded as decisive, the Department nevertheless concedes that

> . . . a wide range of activities can be characterized fairly as 'repairs.' Some of those activities will involve processes quite similar to assembly and fabrication activities, which generally are regarded as 'manufacturing' within

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[5] Comments at 3-4.

> the meaning of section II(D)(2) of the [decree]. Other types of 'repair' activities may appear to be more closely related to the ongoing maintenance of an intraLATA telecommunications system, an activity which is obviously permitted to the [Regional Companies].
>
> * * *
>
> Just as the decree's 'manufacturing' prohibition is ambiguous with respect to 'repairs,' the definitions of telecommunications equipment and CPE provide limited guidance with respect to test equipment. In the interests of clarity, the Department suggests that the Court should rule that test equipment is not integrated with, or incorporated in switching and transmission facilities or CPE does not fall within the equipment restrictions of the [decree].[6]

It is obvious from these comments that neither the repair nor the equipment testing concept is sufficiently homogeneous that an intelligible ruling, having significant meaning for future activities or proposed activities, could

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[6] Reply of the United States at 3-7.